No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The government argues that the issues raised in this Petition for Certiorari are not "ripe" because petitioners "have not yet exhausted their remedies under the DTA." Brief for the Respondents in Opposition ("Gov. Opp.") at 12. But the government's response demonstrates, in fact, that the key issues raised are ripe for determination by this Court, and that they should be decided now.

A habeas petitioner has no obligation to exhaust a remedy that is not adequate to vindicate the asserted right. *See, e.g., Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).[1] As Judge Rogers made clear in her dissent below, the review provisions of the DTA, at least as they are interpreted by the D.C. Circuit, are plainly not adequate to vindicate petitioners' asserted habeas rights.

Section 1005(e)(2)(C)(i) of the DTA allows the D.C. Circuit to review a CSRT decision to determine whether it "was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]" – in other words, whether the CSRTs followed their own procedures in reaching their determinations. Under that section, the court would be precluded from going behind the CSRTs to determine whether the definitions they used were legally sufficient and whether the procedures they followed were fair, adequate, and legitimate. That, however, is a fundamental requirement of habeas. As Justice Holmes famously wrote:

> [H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been pre-

[1] As explained in petitioners' Reply in support of their Motion to Expedite, there is serious doubt whether DTA review is even available to petitioners. *See* Reply to Respondents' Opposition to Motion to Expedite at 1 n.1.

> served, opens the inquiry whether they have been more than an empty shell.[2]

Any review process – such as the one set forth in Section 1005(e)(2)(C)(i) of the DTA – that limits the court to determining whether the jailor has followed its own rules, and precludes an inquiry into whether the rules themselves are adequate and more than an empty shell, cannot be an adequate or effective substitute for habeas.[3]

The DTA does provide a method for determining whether the standards and procedures followed by the CSRTs were adequate. Section 1005(e)(2)(C)(ii) (emphasis added) allows the D.C. Circuit to consider, "*to the extent the Constitution and laws of the United States are applicable*, whether the use of such standards and procedures to make

[2] *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Justice Holmes' dissenting opinion was later made the law of the land in *Moore v. Dempsey*, 261 U.S. 86 (1923). *See Fay v. Noia*, 372 U.S. 391, 411 n.22 (1963). His words frequently have been quoted with approval. *See, e.g., Harris v. Nelson*, 394 U.S. 286, 291 n.2 (1969); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc).

[3] Citing a number of cases reviewing convictions after trial by military tribunals, the government argues that "in the context of the decisions of military tribunals, this Court has repeatedly held that habeas does not provide for factual review . . . ." Gov. Opp. at 18. That may be so where the underlying process being reviewed allows for adequate factual development. Habeas, however, always enables the court to determine whether or not the underlying process being reviewed is fair, adequate, and legitimate and allows for adequate factual development. Any process that does not cannot be an adequate substitute for habeas, and habeas cannot be replaced and the courts restricted in their review of the legality of the detention by a process that is so inadequate. As Judges Green and Rogers concluded, and as pointed out in the Petition for Certiorari, the CSRTs were completely inadequate to test the legality of the detention. Pet. at 7-8, 12 n.24.

the determination is consistent with the Constitution and laws of the United States." The government, of course, has argued strenuously that the Constitution and laws of the United States are not applicable to these detainees because they are aliens held at Guantanamo. Gov. Opp. 19-25. It says, however, that review by this Court is premature because "the D.C. Circuit . . . can determine the nature of petitioners' rights, if any, under the 'laws of the United States' and the U.S. Constitution, and can decide whether the CSRT process violated any applicable rights." Gov. Opp. at 17. But the D.C. Circuit has already decided that issue. Based on *Johnson v. Eisentrager*, the D.C. Circuit held that petitioners have no constitutional rights and therefore are not entitled to constitutional review of the adequacy of the CSRT procedures. App. 15-17, 52-53.

The issue is therefore ripe for decision by this Court. It must be decided by this Court in order to determine the scope of review available under the DTA, as well as whether the government is correct in asserting that these petitioners have no constitutional protections whatsoever, including protections under the Suspension Clause of the Constitution. Those issues have been decided, albeit wrongly, by the D.C. Circuit. There are no remedies left for the petitioners to exhaust. These issues should be decided by this Court now so that these petitioners, imprisoned without a fair hearing for more than five years, are not forced to endure months and years more deprived of justice because of judicial delay.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to the Court of Appeals.

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